5. In continuation of the various verbal approaches made between the plaintiff through the defendant the plaintiff wrote on the 18th October, 1976 a letter to the defendant reminding him of his obligations to sell the said piece of land which the defendant acknowledged.

6. Nevertheless, in breach of the agreement with the plaintiff the defendant filed an application before the Rent Tribunal, Muar for recovery of the said premises.

7. The plaintiff has been and are still willing, able and ready to pay the said price as stipulated above and to comply with the other requirements.

8. In the above premises, the plaintiff claims:—

The Plaintiff's claim is against the defendant for:—

(a) specific performance of the Agreement between the plaintiff and the defendant made sometime in the year 1968 and subsequently regarding sale/lease of a house known as No. 1, Jalan Sisi, Muar, Johore

(b) damages in lieu of or addition to a specific performance.

Dated this 22nd day of July, 1979."

In all the circumstances of this case I was of the view that the plaintiff had not acted *bona fide* in bringing this action against the defendant. The statement of claim made vague allegations against the defendant regarding the so-called agreement "made sometime in the year 1968 and subsequently." The plaintiff's action clearly appeared to be an attempt to frustrate the defendant's intention of developing his property. The defendant has had his plans for a 4-storey building approved and has arranged for a bank loan to finance the project. He has also made an application under section 18 of the Control of Rent Act, 1966 to the Rent Tribunal where the application is pending after having been adjourned twice. The final adjournment was granted on July 17, 1979 to August 14, 1979. However just one day earlier on August 13, 1979 the defendant was served with the writ of summons in this case. When the application came up before the Rent Tribunal for hearing on August 14, 1979 the Tribunal adjourned the hearing *sine die* on the ground that the application should not be heard until the outcome of the civil suit. The plaintiff did nothing to enforce his claim that the defendant had made a promise to sell the premises to him until this last minute which clearly shows that he has brought this action in order to embarrass the plaintiff and delay his building project. In the circumstances therefore I held that the defendant was entitled to his application on the ground that the plaintiff's action was malicious, vexatious and an abuse of the process of the court. I accordingly struck out his statement of claim and dismissed his action against the defendant.

Order accordingly.

Solicitors: *E. Ramasamy & Co.; Elyas Majeed & Co.*

SIOW CHOO FOO v. LEE PENG LAY & ANOR.

[O.C.J. (Yusof Abdul Rashid J.) November 25, 1980]
[Muar — Civil Suit No. 213 of 1977]

Damages — Quantum — Multiple injuries including injury to liver and eye — $11,500 as general damages.

Road Traffic — Duty of care — Stationary lorry with tail lights off.

The plaintiff in this case suffered personal injuries and loss as a result of a collision between his motorcycle and the defendant's lorry. The court accepted the plaintiff's evidence that the lorry was stationary with its rear lights switched off when the collision took place.

The plaintiff suffered the following injuries: (1) laceration on left forehead, 3½ extending to left upper and lower eye-lids — the plaintiff could not open his left eye; (2) laceration of 1 in. on left upper lip; (3) laceration of ½ in. on lower lip; (4) puncture wound at medial end of left clavicle; (4) superficial abrasion on right anterior chest. He also had to undergo surgery. He sustained laceration of 3 in. on the superior surface of liver on right lobe — it was bleeding. There was blood in the peritoreal cavity and a slight contusion of the greater curvature of the stomach. He was hospitalised for 14 days and was unable to work for 70 days. He was earning wages of $300 a month.

Held: (1) to leave a stationary lorry on the road on a dark night with its tail lights off was potentially a dangerous act and an act lacking the duty of care owed to the other users of the road; the first defendant was therefore to blame for the collision;

(2) the plaintiff too owed a duty of care for his own safety. On being blinded by the glare of the headlights of the on-coming vehicle, it would be prudent for the plaintiff to slow down his speed considerably, or even to pull to the side for safety. In this case he "did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury";

(3) the first defendant was 2/3 to blame and the plaintiff was 1/3 to blame for the accident;

(4) special damages of $700 and a global sum of $11,500 as general damages based on 100% liability on the defendants was awarded to the plaintiff.

Cases referred to:-

(1) *Lim Kar Bee* v. *Abdul Latif* [1978] 1 M.L.J. 109, 116 & 117.

(2) *Donoghue* v. *Stevenson* [1932] A.C. 562.

(3) *Davies* v. *Swan Motor Co. (Swansen) Ltd.* [1949[2 K.B. 291.

(4) *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448.

CIVIL SUIT.

Tee Eng Tuan for the plaintiff.

S.S. Mukar for the defendants.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: This was a claim by the plaintiff for damages for personal injuries and loss said to be caused by the negligence of the first defendant.

It was common ground that on December 7, 1976 at about 9.00 p.m. the plaintiff was riding motorcycle No. JG 3847 along the Sungai Mati/Bukit Kangkar Road and was going in the direction of Bukit Kangkar. A motor lorry No. JL 4563 was parked by the first defendant, who was the servant or agent of the second defendant, near an electric post about the 7¼ milestone. At the time and place in question a collision took place between the said motorcycle and the said motor lorry as a result of which the plaintiff

sustained injuries. The stretch of road where the accident took place was straight, dry, metalled and was 22 feet wide.

In evidence, the plaintiff testified that at the time and place in question he was riding his motorcycle at about 35 m.p.h. when his sight was blinded by the glare of headlights of an on-coming vehicle. As a result he could not see clearly what lay in front of him. There was nothing to warn him that a lorry was parked on the road on his path. The rear lights of the lorry was not on nor was there a "triangular" warning sign on the road to pre-warn users of the road of a broken down lorry parked on the metal part of the road. The plaintiff realised the presence of the lorry too late and could not avoid colliding into the rear part of the said motor lorry.

The first defendant, on the other hand, said that when driving the motor lorry he heard a sound of puncture coming from one of the tyres of the lorry. He pulled the motor lorry to a stop. While he was getting down the lorry, he heard a sound of collision when the motorcycle collided against the rear part of the lorry. The first defendant denied that there was an on-coming vehicle with its headlights full on. He also denied that the rear lights of the lorry were off.

Of the two versions, I accepted the version of the plaintiff as more probable and rejected the evidence of the first defendant. The plaintiff's evidence was consistent with the police report lodged by him except that there was a confusion about the distance when he first sighted the stationary lorry. I accepted the plaintiff's explanation and found that he first saw the motor lorry when he was 50 feet away and not 50 yards as in the police report. In the police report and from the agreed facts, it was disclosed that the motor lorry had come to a stop and was stationary when the collision took place but in evidence the first defendant insisted that the motor lorry had not come to a stop yet when the motorcycle collided into the rear part of the lorry. This was an important aspect of the evidence. If in fact the motor lorry had not come to a stop yet, then the rear lights of the motor lorry might well be still on. Had the motor lorry come to a stop it would be more probable that the rear lights had been switched off. I believed that the motor lorry was stationary when the collision took place and that the rear lights had been switched off.

The evidence of the plaintiff that the night was dark went unchallenged and I was of the view that to leave a stationary lorry on the road on a dark night with its tail lights off was potentially a dangerous act and an act lacking the duty of care owed by him to the other users of the road. At this juncture it is pertinent to quote certain parts of the speech of Raja Azlan Shah F.J. (as he then was) in the Federal Court case of *Lim Kar Bee* v. *Abdul Latif bin Ismail*[1]:

"The claim in negligence postulates a breach by the defendant of some duty owed by him to the plaintiff. Accordingly the first question to be asked and answered is whether a duty was owed to the plaintiff by him of which he committed a breach. In order to determine the existence of this duty, I think a citation of two passages from well-known judgments are relevant. The first is from the judgment of Brett M.R. in *Heaven* v. *Pender* (1883) 2 Q.B.D. 503:

'Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'

The second is from the famous *dictum* of Lord Atkin in *Donoghue* v. *Stevenson*:[2]

'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.

See also the latest exposition of the law based on the neighbour-principle in the speech of Lord Wilberforce in *Anns* v. *London Borough of Morton* [1977] 2 All E.R. 492. 498. It may be noted that there is no negligence in the abstract but a duty related to the particular circumstances of the plaintiff. The liability only arises 'where there is a duty to take care and when failure in that duty has caused damage': *per* Lord Macmillan in *Donoghue* v. *Stevenson* (*supra*, page 618). Such a duty only arises to those persons so placed that they may reasonably be expected to be injured by the acts or omissions of the defendant (see *Hay* or *Bourhill* v. *Young* [1943] A.C. 92, 104). Foreseeability in an essential ingredient (see *The Wagon Mound* (No. 2) [1967] 1 A.C. 617, 639). Thus, where the act of a third party is reasonably foreseeable, the defendant owes a duty to take care that it does not occur...."

In the circumstances, I found that the first defendant was to blame for the collision.

However, the plaintiff too owed a duty of care for his own safety. Relying on the evidence of the plaintiff himself it was evident that the plaintiff was guilty of contributory negligence. In *Davies* v. *Swan Motor Co. (Swansea) Ltd.*,[3] Bucknill L.J. said at page 308:

"...When one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of Lord Atkin in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, 164 as follows:—

'But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or the property that is used by the ordinary reasonable man in those circumstances'...."

Dealing with the concept of contributory negligence, Viscount Simon, who delivered the judgment of the Privy Council in *Nance* v. *British Columbia Electric Railway Co., Ltd.*,[4] said, at page 450:

"...The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities by the English Court of Appeal in *Davies* v. *Swan Motor Co. (Swansea), Ltd.* [1949] 1 All E.R. 620, to which the Chief Justice referred. This, however, is not to say that in all cases the plaintiff who is guilty of con-

tributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot can never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet, such instances may easily occur, e.g. if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind, or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care...."

In the instant case, on being blinded by the glare of the headlights of the on-coming vehicle, it would be prudent for the plaintiff to slow down his speed considerably, or even to pull to the side for safety. In evidence, the plaintiff said that he proceeded on without taking any other action. As such, the plaintiff "did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury."

In apportioning liability, I was of the opinion that the first defendant was 2/3 to blame and the plaintiff was 1/3 to blame for the accident. The plaintiff would be safe to proceed notwithstanding his eyes being blinded by the glare from the headlights of the on-coming vehicle had the first defendant parked his motor lorry on the side table or at least switched on the tail lights of the motor lorry which might be spotted a distance away. In terms of degree, the blameworthiness of the first defendant was higher than that of the plaintiff.

As a result of the accident the plaintiff lost consciousness and suffered the following injuries:

(a) Laceration on the left forehead of about 3½ inches extending to the left upper and lower eye-lids. Plaintiff could not open his left eye;

(b) Laceration of about 1 inch on the left upper lip;

(c) Laceration of about ½ inch on the lower lip;

(d) there was a puncture wound at the medial end of the left clavicle;

(e) there was superficial abrasion on the right anterior chest.

Surgery had to be performed on the plaintiff and the findings were:

(i) there was a laceration of about 3 inches on the superior surface of the liver on the right lobe and it was bleeding;

(ii) blood was also found in peritoreal cavity; and

(iii) there was a slight contusion of the greater curvature of the stomach.

It was necessary to evacuate the clots and repair the laceration on the liver. Double drains were inserted for this purpose.

The plaintiff was hospitalised for 14 days and then on being discharged was treated as an outpatient for 7 days.

Before the commencement of the trial, the learned counsel for the plaintiff reported, confirmed by the learned counsel for the defendants, that a sum of $200 had been agreed to constitute special damages except in relation to special damages for the loss of earning incurred by the plaintiff. In this regard, the plaintiff contended that he was earning wages of about $300 per month and that he was unable to work for 70 days. This contention was not seriously disputed and I would award special damages under this item, based on 100% liability on the defendants in a sum of

$$\frac{70 \times \$300}{30} = \$700.$$

I would award the following general damages, based on 100% liability on the defendants:

(a) Loss of consciousness	...	$ 500
(b) Lacerations, pain and sufferings	...	$3,000
(c) Injury to liver	...	$5,000
(d) Defective vision of left eye (as plaintiff not even advised to wear glasses to correct defect).	...	$3,000

Under the circumstances I would award a global sum of $11,500 as general damages based on 100% liability on the defendants.

Special damages would bear an interest at 3% per annum from date of accident till date of service of the writ and the general damages on interest of 6% per annum from date of service of the writ to date of judgment.

Costs to plaintiff.

Order accordingly.

Solicitors: *Murphy & Dunbar; Lovelace & Hastings.*

SINGAPORE AIRLINES LTD. v. CARDOSA

[A.C.J. (B.T.H. Lee J.) November 27, 1980]
[Kuala Lumpur — Civil Appeal No. 29 of 1979]

Employment — Contract — Excess leave claim against pilot — Late payment of bonus — Whether pilot entitled to bonus — "Functional crew member" explained — Pilots Agreement, 1971.

The appellant in this case appealed against the whole decision of the lower court. The respondent was a trainee cadet pilot employed by the Malaysia-Singapore Airlines Ltd. by a letter dated May 14, 1971. Consequent to MSA being re-structured the respondent was employed by the appellant by letter dated December 9, 1971, upon the same terms and conditions as contained in the letter of May 14, 1971. The appellants had appointed the respondent as cadet pilot with effect from August 23, 1972, and as second officer with effect from October 5, 1972 upon the terms and conditions as set out in the "Pilots Agreement" 1971. The respondent tendered his resignation as second officer with effect from June 10, 1974 and the appellants accepted the said resignation by letter dated June 8, 1974. The respondent was entitled to 42 days' paid leave and the appellants programmed the respondent to go on leave by posting his dates of leave on the block leave poster and by expressly and/or impliedly requiring him to take leave.

The appellants claimed that the lower court erred in law